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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-

JAMES BERT WILLIAMS,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS, STATE OF GEORGIA

BRIEF IN OPPOSITION FOR THE RESPONDENT

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QUESTION PRESENTED

When an individual commits two separate and distinct criminal acts at different times and places, neither one being a lesser included offense of the other, both crimes involving gambling, one for commercial gambling and the other for communicating gambling information, is the prosecution of the latter crime in a different county and at a later time barred under the double jeopardy clause of the Constitution following the entry of guilty pleas to the former criminal charges?

STATEMENT OF THE CASE

The Petitioner, James B. Williams and another individual by the name of Dan C. Morrow were indicted by a Fulton County grand jury for committing the offense of communicating gambling information in violation of Ga. Acts 1968, pp. 1249, 1320 (Ga. Code Ann. § 26-2706). The Petitioner's subsequent conviction in the Superior Court of Fulton County, which is the basis for this petition for writ of certiorari, arose out of information which law enforcement officers received from a wire tap which was initiated on November 29, 1975, pursuant to a court order under the provisions of Ga. Laws 1968, pp. 1249, 1328; 1972 p. 615; 1972 pp. 952, 953 (Ga. Code Ann. § 26-3004). As a result of the Walton County wire tap the Petitioner was indicted for the offenses of communicating gambling information and commercial gambling information, the latter being in violation of Ga. Laws 1968, pp. 1249, 1318; 1970, pp. 236, 238; 1977, p. 748 (Ga. Code Ann. § 26-2703). Pleas of guilty were entered in February of 1975 to the Walton County charges.

As a result of information which law enforcement officers received during the Walton County tap it was learned that the Petitioner was violating Ga. Code Ann. § 26-2706, communicating gambling information in another county in the State, that being Fulton County, Georgia. On December 16, or one day prior to the expiration of the Walton County tap, Fulton County law enforcement authorities received permission pursuant to Ga. Code Ann. § 26-3004 to institute a tap on the Petitioner's telephone. As a result of this tap the Fulton County convictions which are the subject of this petition for writ of certiorari resulted.

The Walton County offenses for which the Petitioner, as noted above was indicted were for the dates of December 1 through December 15, 1975. The Fulton County gambling violation occurred on December 20, 1975.

It is the Petitioner's contention that his subsequent indictment and prosecution in Fulton County was barred under the double jeopardy provision of the Constitution since he alleges that both criminal indictments arose from the same course of conduct, that is conduct involving gambling. The Fulton County Superior Court disagreed with this argument of the Petitioner and denied his plea of "Autrefois Convict". On appeal the Court of Appeals of Georgia concurred with the lower court's ruling.[1/] The Supreme Court of Georgia refused to review the holding of the Court of Appeals of Georgia.

1/ Morrow et al. v. State, 147 Ga. Ap. 395 (1978).

REASON FOR NOT GRANTING THE WRIT

WHERE THERE ARE SUCCESSIVE CRIMINAL ACTS, EACH WITH DIFFERENT ELEMENTS OF PROOF, EACH OCCURRING AT DIFFERENT TIMES AND PLACES EVEN THOUGH THESE ACTS MAY UNITE INTO ONE STREAM OF CRIMINAL CONDUCT, AND WHERE EACH CRIMINAL ACT IS SEPARATELY PROHIBITED, EACH MAY BE SEPARATELY PROSECUTED WITHOUT THERE BEING ANY DOUBLE JEOPARDY VIOLATION.

The thrust of the Petitioner's application for a writ of certiorari is that the Fulton County gambling offense is a lesser included offense of the earlier Walton County convictions for which he entered pleas of guilty. Consequently, Petitioner says that his Fulton County conviction is barred under the double jeopardy provision of the United States Constitution because of this Court's rulings in Harris v. Oklahoma, 433 U.S. 682 (1977) and Brown v. Ohio, 432 U.S. 161 (1977). Sub judice, however, this is not the case, because the criminal conduct involving gambling which was entered into by the Petitioner in both Walton and Fulton Counties violated two criminal statutes, each statute requiring proof of an additional fact which the other does not require, each offense occurring at a different time and at a different place, and as such the pleas of guilty in Walton County do not exempt the Petitioner from prosecution in Fulton County under another criminal statute, the violation of that statute occurring at a different date, time, and place. Gravieres v. United States, 220 U.S. 338, 342 (1911); see Blockburger v.

United States, 284 U.S. 299, 304 (1932). To support his claim of double jeopardy, the Petitioner must show that the offenses charged are in law and in fact the same offense. Gravieres v. United States, supra at 343; United States v. Marable, 578 F.2d 151(5th Cir. 1978); Hattaway v. United States, 399 F.2d 431, 432 (5th Cir. 1968). The heart of double jeopardy is thus the prohibition against multiple prosecutions for the same offense, and unless each offense requires proof of an additional fact that the other does not, trial of the greater offense forecloses trial of the lesser or vice versa. Brown v. Ohio, supra; Blockburger v. United States, supra.

However, the fact that an offender violates in a single transaction for example several criminal statutes does not make it one crime for the purposes of conviction and punishment. Gore v. United States, 357 U.S. 386 (1958). Likewise, the same course of conduct on the same occasion may amount to separate offenses, each of which may be separately punished. Ebeling v. Morgan, 237 U.S. 625 (1915); Morgan v. Devine, 237 U.S. 632 (1915); Gravieres v. United States, supra. The stream of criminal conduct engaged in by the Petitioner in both Walton and Fulton Counties concerned commercial gambling and the communicating of gambling information. The later Fulton County conviction involved communicating gambling information in violation of Ga. Code Ann. § 26-2706 on December 20, 1975. The earlier Walton County prosecutions involved not only communicating gambling information, but also commercial gambling in violation of Ga. Code Ann. § 26-2703 for a twenty day period ending in Walton County on December 15, 1975. Clearly, the Fulton County

matter which is under attack in this petition involves distinct transactions at different times, different places and different dates. Blockburger v. United States, supra at 301. Furthermore, the act of communicating gambling information does not create an offense of engaging in a forbidden business, but penalizes each communication and each conversation, so that each conversation constitutes a distinct offense, regardless of how close they may follow each other. Id. at p. 302.

> "'If successive impulses are separately given, even though all united in swelling a common stream of action, separate indictments lie'" Wharton's Criminal Law, 11th ed., § 34 or, as stated in note 3 to that section, the test is whether the individual acts are prohibited, or the course of action which they constitute. If the former, then each act is punishable separately . . . If the latter there can be but one penalty. Id.

Sub judice, the crimes of commercial gambling and communicating gambling information when committed at different times and in different places are not as the Petitioner suggests included offenses, since each individual act is prohibited, and as such each act may be punished separately no matter how close they may be in time to each other. See e.g., Bins v. United States, 331 F.2d 390, 393 (5th Cir. 1964). Furthermore, the Fulton County conviction does not arise out of the

Walton County convictions, the only common ground being that the Walton wire taps led to the implementation of a tap in Fulton County which subsequently resulted in the Petitioner committing separate and distinct criminal acts of communicating gambling information in violation of Ga. Code Ann. § 26-2706 at a later time, date and place.

As this Court noted in Iannelli v. United States, 420 U.S. 778 (1975), concerning the offenses of conspiracy and violating gambling laws under 18 U.S.C. § 1955, that Congress intended for each offense to be an "'independent curb' available for use in the strategy against organized crime." Id. at p. 785. Likewise, it can be said that the General Assembly of Georgia intended for the offenses of communicating gambling information and commercial gambling to be separate and distinct crimes for combating organized crime. Similarly, it can be said that the Georgia General Assembly in enacting Ga. Code Ann. § 26-2706 (Communicating Gambling Information), and Ga. Code Ann. § 26-2703 (Commercial Gambling), intended to " . . . turn the screw of the criminal machinery -detection, prosecution and punishment tighter and tighter." Gore v. United States, 357 U.S. 386, 390 (1958). Consequently, in the areas of narcotics and gambling there is legislative intent that there may be prosecutions for separate and distinct criminal acts regardless of how close in time they occur to each other when there is legislative intent that it is the individual acts which are to be prohibited and not just the course of action. Blockburger v. United States, supra at p. 302. In this case, the communication of gambling information in Fulton County on December 20, 1975, constituted a fresh communication by the Petitioner, or as stated in Blockburger, supra,

"a new bargain." Id. at p. 303.

The Petitioner seeks to place great emphasis on the fact that both the Walton and Fulton taps were to be "continuing". This emphasis on the word "continuing" is misplaced in terms of this petition because the words "continuing nature" refer to the fact that the law enforcement officers wished to have the wire tap remain through the entire twenty day period and not to have it terminate upon the interception of one or more calls which may have indicated gambling activity. Therefore, the words "continuing nature," merely refer to the fact that the law enforcement officers wished the tap to remain in effect for the twenty days as authorized by Ga. Code Ann. § 26-3004 rather than having it terminate upon the first intercept containing a conversation involving the communicating of gambling information.

Since the Fulton County offenses of communicating gambling information are not lesser included offenses of the Walton County prosecutions which also involved communicating gambling information, but rather contain separate and distinct prohibited criminal actions at a different time, date and place, the Petitioner's reliance upon Brown v. Ohio, supra, is not applicable.

CONCLUSION

For these reasons, Respondent respectfully urges this Court to deny the petition for writ of certiorari filed on behalf of the Petitioner, James Bert Williams.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, John C. Walden, Attorney of Record for the Respondent, and a member of the Bar of the Supreme Court of the United States, hereby certify that in accordance with the rules of the Supreme Court of the United States, I have this day served a true and correct copy of this Brief in Opposition for the Respondent upon the Petitioner by depositing three copies of same in the United States mail, with proper address and adequate postage to:

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This 31st day of January, 1979.

/s/
JOHN C. WALDEN